APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 81-3076

ALBERT NELSON,

Plaintiff,

versus

CONTINENTAL GRAIN, ET AL.,

Defendants.

****

PLAINTIFF'S LEGAL COMMITTEE,

Plaintiff-Appellee,

versus

ANN CLARK LAZZARA,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

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(May 28, 1982)

Before CLARK, Chief Judge, POLITZ and RANDALL, Circuit Judges.

PER CURIAM:

The district court correctly applied Re: Air Crash Disaster at Florida Everglades, 549 F.2d 1006 (5th Cir. 1977). The district court's findings of fact were not clearly erroneous.

AFFIRMED. See Local Rule 21.

APPENDIX "B"

THE COURT:

The District Court has inherent power to conduct its docket in the manner most economic, in terms of time and effort for itself, counsel and litigants. A Court may order consolidation despite opposition of parties to avoid overlapping procedures. The District Court has authority to authorize a lead committee to conduct settlement negotiations.

The non-contracting parties only attended a few depositions at the beginning of the litigation, as I understand from what Magistrate Carriere found. Their activity was limited to preparing estimates of their clients' quantum of damages. Essentially that's what their activities were.

The degree of representation performed by the Plaintiffs' Legal Committee on behalf of the non-contracting plaintiffs cannot be accurately determined since the defendants conceded liability on all the claims prior to discussion of individual claims. Therefore, it was unnecessary to allocate the amount of time spent on each plaintiff. Ms. Lazzara's plaintiff's recovery was only 4.4 percent of the whole, and Berger's was .4 percent, as nearly as I can figure it. The time consumed in segregating these specific recoveries would only serve to thwart judicial economy. The Magistrate's findings of fact are not clearly,

I repeat, are not clearly erroneous.

The appointment of the Plaintiffs' Legal Committee was an act of Federal procedural significance and not on the issue of substantive law. Therefore, Federal and not Louisiana law applies in this Court's opinion.

Now, the Plaintiffs' Legal Committee relies heavily—all of the arguments boil down to whether or not the Court will accept the Magistrate's findings of fact and recommendations.

Now, with regard to the law to be applied, Counsel Lazzara and Berger argue that this is a diversity case, and therefore, Louisiana Law applies. They argue the "Common Fund" doctrine does not apply under Louisiana Law.

Now, the Plaintiffs' Legal Committee relies heavily on the *In Re: Air Crash Disaster at Florida Everglades, 549 Fed 2nd 1006,* decided by the Fifth Circuit Court of Appeals of the United States in 1977.

Now, the *Everglades* case involves one hundred fifty claims for death and injuries arising out of a crash of an Eastern Airlines plane crash in the Everglades in Florida. Although it is not stated, it appears to the Court that the suit was filed on the basis of diversity jurisdiction.

The Court appointed a Plaintiffs' Committee to represent some sixty plaintiffs. The extensive discovery and pre-trial preparation was carried on by the Committee

which was largely responsible for the concession of liability and the subsequent settlement of many of the cases.

The Court awarded compensation to the Committee for their work as lead counsel by ordering each other attorney representing a plaintiff, except those who had actively participated in the pre-trial activity, to pay the Committee a part of the fee he or she was entitled to receive from his or her client.

Now, the Court in the *Everglades* case sent a proposed stipulation to all parties suggesting they agree to a consolidated test trial on liability, which also contained a provision concerning a payment of a fee to the Committee. Not all of the plaintiffs joined in the stipulation.

Now, while the parties were negotiating settlement, the Court set a hearing on attorney's fees and awarded the Committee a fee of eight percent of the settlement obtained by each plaintiff out of the fee of that plaintiff's attorney.

The Florida Judge's rationale was threefold:

(1) To achieve the goals of multi-district litigation;

(2) To compensate the Committee for work done beyond that necessary for their own clients, and

(3) the "equitable fund" doctrine.

The Judge in the *Everglades* case found the Commit-

tee's approach was a necessary incident to the achievement of the goals of multi-district litigation, and I stress that, he found "The goal of the expeditious processing of all actions arising from a common disaster each claim for relief being a potentially protracted case, can only be accomplished by avoiding duplicitous discovery conflicting contemporaneous ruling by coordinate district and appellate court and fostering the convenience of parties and witnesses."

The United States Court of Appeals for the Fifth Circuit noted a trial court has managerial power described as "the power inherent in every court to control the disposition of the cases on its docket with economy of time and effort for itself, for counsel, and for litigants.

"We face the hard necessity that, within proper limits, judges must be permitted to bring management power to bear upon massive and complex litigation to prevent it from monopolizing the services of the court to the exclusion of other litigants." And if this was ever a case where this applies, it certainly, in this Court's opinion, applies here.

The Court stated that the trial court's managerial powers are especially strong and flexible in matters of consolidation. Federal Rules of Civil Procedure 42(a) provides in part, "The Court may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delays." He may order consolidation despite the opposition of the parties, despite the opposition of Ms. Lazzara and

Mr. Berger.

A Federal Court in a complex, consolidated case may designate one attorney or set of attorneys to handle pretrial activity on aspects of a case where the interests of all co-parties coincide, says *MacAlister v. Gulermo, 263 Fed 2nd 65*, decided by the United States Court of Appeals for the Second Circuit in 1958.

The Manual for Complex Litigations sets out recommended procedures for complex cases. It does not create rights or bind judges to its procedures.

Section 1.90 of the Manual provides for the appointment of liaison counsel to represent a group of parties. That section states:

> "It is recommended that in appropriate cases the order of appointment make provision for reimbursement of liaison counsel not only for expenses but also for such services as he may render at the request of or pursuant to the order of the Court."

Now, the Everglade Court found Section 1.90's recognition of power in the Court to order compensation to one titled liaison counsel carrying the more significant duties and responsibilities of lead counsel.

The Fifth Circuit found the District Court had the power to direct the Committee and its counsel to be compensated and that requiring the payment from other at-

torneys was permissible.

The Court's rationale was first, that if lead counsel are to be an effective tool, the Court must have means at its disposal to order appropriate compensation for them. The Court found such assurances are necessary to protect the interests of all the parties.

The Court rejected the argument that lead counsel who personally represent some of the claimants are paid twice for the same work, as is the contention of Mr. Berger and Ms. Lazzara. The Court found the lead counsel's services are in part for all parties with like interests and their lawyers. To a degree, lead attorneys become officers of the Court. By making manageable litigation that otherwise would run out of control they serve interests of the Court, the litigants, the other counsel, and the Bar and of the public at large, who are entitled to their chance at access to unimpacted courts.

As an additional ground, the Court found its power to order compensation was reinforced by the body of law concerning the equitable power of the Court to allow counsel fees and litigation expenses out of the proceeds of a fund that has been created, increased or protected by successful litigation. The rationale behind these cases is that it is fair to require payment by those who accepted the fruit of the labor of others, and if anybody ever accepted the fruit of the labor of others, it was Mr. Berger and Ms. Lazzara.

The Court recognized this disaster case was not a traditional equitable fund case. This case involves larger interests, whose vindication commands affirmative intervention by the Court and the assignment of additional responsibilities to some attorneys, inuring to the benefit of other attorneys, as it did in this case.

The Fifth Circuit in *Everglades* has recognized the need for employing complex litigation techniques in large disaster cases. It appears that the Fifth Circuit is encouraging District Judges to employ new procedures to minimize the judicial time and effort concentrated in these complex cases. The manner in which the Court appoints lead counsel and how they will be compensated is a Federal procedural issue and therefore not subject to the dictates of Louisiana substantive law. If that be treason make the most of it, Ms. Lazzara and Mr. Berger.

The Court in *Everglades* did not go into any discussion with regard to Florida law in discussing how the issue of attorney's fees would be determined.

Now, Ms. Lazzara and Mr. Berger are complaining about the factual findings of the Magistrate with regard to the amount awarded the PLC out of their recovery.

A Special Master's findings, as was the Magistrate in this case, he was a Special Master, ought to be adopted by the District Court unless the findings are on their face clearly erroneous. A finding is not erroneous unless the

reviewing Court is left with a definite and firm conviction that a mistake has been made. So says *Paper Converting Machinery Company, Inc., v. FMC Corporation, 432 Fed Supplement 907, affirmed 588 Fed 2nd 832 in 1977.*

The Magistrate held a hearing for several days, as counsel for the Committee pointed out, on the hours worked by the individual PLC members.

Now, several days it took the Magistrate's Court because of the complaining parties here, Mr. Berger and Ms. Lazzara.

The Magistrate was very familiar with with work going on in this case, and I, the Court, believe was in the best position to determine the accuracy of the time records kept by these lawyers. It would have been impossible, I think, to assess the exact amount of time allocated to each individual plaintiff as suggested by Ms. Lazzara and Mr. Berger. the issue of liability was never actually litigated. It was through the efforts of the PLC that the defendants decided to concede liability and settle the case. Obviously the non-contracting parties benefitted from the work of the PLC. Under the circumstances, this Court feels that it shouldn't penalize the PLC because the records don't specifically reflect the amount of time spent on each liability issue. Such a requirement doesn't fit into the context of complex litigation.

Counsel suggests and the Magistrate recognizes

that they continued to participate in the work after the PLC was appointed. However, there is no allegation that they participated to the same degree as the PLC members, because I don't think they would have the temerity to say so. This Court is aware of the constant court appearances, the extensive depositions taken and the thousands of documents filed by the Plaintiffs' Legal Committee. I don't believe the participation by the above two individuals, namely, Ms. Lazzara and Mr. Berger should result in the reduction of their contribution to the PLC for the work it did on behalf of their clients.

Now, with regard to Ms. Lazzara's contention that the PLC acted in concert with defense attorneys to lower the value of her client's settlement, the Court agrees with the Magistrate's findings that each class of plaintiffs were treated equally in the final settlement formula as determined by Judge Rubin.

The Magistrate points out that Lazzara's clients who were not Continental Grain employees received the benefits contained in the Continental Grain Union Contract. She should be thankful for that.

It appears that her clients received a better settlement than if they had individually pursued their claim.

So this Ccurt believes that the formula used by the Magistrate was fair and based on competent evidence, and hereby adopts the Findings and Recommendations of the

Magistrate and deny the motions of Ms. Lazzara and Mr. Berger.

Take your appeal.

APPENDIX "C"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ALBERT NELSON	CIVIL ACTION
VERSUS	NO. 78-19
CONTINENTAL GRAIN COMPANY	SECTION "F"

JUDGMENT

The Court having considered the evidence presented, the argument of counsel, and the law applicable to the case; accordingly:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of Plaintiffs' Legal Committee and against Ann Clark Lazarra in the amount of NINETY-TWO THOUSAND FOUR HUNDRED DOLLARS ($92,400.) and against Allen Berger in the amount of EIGHT THOUSAND, FOUR HUNDRED DOLLARS ($8,400.) with interest from the date of judgment.

New Orleans, Louisiana, this 26th day of January, 1981.

/S/LANSING L. MITCHELL
UNITED STATES DISTRICT JUDGE

APPENDIX "D"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ALBERT NELSON	**CIVIL ACTION**
versus	**NUMBER 78-19 and Consolidated Cases**
CONTINENTAL GRAIN COMPANY, ET AL	**SECTION "F" (2)**

SPECIAL MASTER'S FINDING AND RECOMMENDATION

Pursuant to the Order of Reference of the Honorable Lansing L. Mitchell, United States District Judge, this matter was referred to the Honorable James D. Carriere, United States Magistrate, for the purpose of conducting an evidentiary hearing to calculate an attorneys' fee.*

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. On December 22, 1977, a grain elevator owned by the Continental Grain Company exploded. As a result of this disaster, nearly 50 death and personal injury suits were filed in this District. In accord with prior practice in

*The District Judge must decide whether he has authority to tax an attorneys' fee against respondents. Further, after the completion of the Court ordered Certified Public Accountant audit, a hearing must be held on the pro rata expenses demanded by the Plaintiffs' Legal Committee from Respondents.

both state and federal courts in this area, a Plaintiffs' Legal Committee was formed for the purpose of conducting discovery and preparing the consolidated cases for trial.** Members of the Committee were selected by election by the attorneys representing plaintiffs. Those elected were: John J. Cummings, III; A. Remy Fransen, Jr,; Wendell H. Gauthier; Russ M. Herman; Stephen B. Murray; and Leonard A. Washofsky. Each of these were able and experienced attorneys primarily engaged in personal injury litigation. After the selection of the Committee, most other attorneys voluntarily entered into a contract with the Committee calling for the payment to the Committee of 8 percent of recovery at the conclusion of the cases. Cases of individual Committee members were not subject to the 8 percent fee. Later, a seventh attorney was added to represent the interests of the Federal Grain Inspection Service survivors.

2. Respondent, Ann Clark Lazzara, graduated from law school and was admitted to practice in the State of Louisiana in the summer of 1977. A few months after her admission to the bar, she undertook the representation of various claimants in the Continental Grain cases. She attended and participated in the Plaintiffs' Legal Committee's organizational meetings and, in fact, held herself out for election to membership on the Committee. After the Committee was formed, she refused to enter into a contractual relationship with the Committee. The same

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**See McKeithen v. S/S Frosta, Consolidated Cases No. 76-3251-C, E.D.La.; Holm v. Tenneco, Consolidated Cases No. 28-793, 25th J.D.C.

holds true for respondent, Allan Burger, who was admitted to practice in this Court in 1975.

3. In early 1978, the District Court entered an order requiring that the Plaintiffs' Legal Committee conduct all pre-trial discovery and trial preparation on liability issues. See: In *Re Air Crash Disaster at Florida Everglades*, 549 F.2d 1006 (5 Cir. 1977). The District Court reserved the right to set a fee to be paid by non-contracting respondents at the conclusion of the litigation. In order to provide a partial support for the calculation of a fair fee, the members of the Committee were ordered to keep "comprehensive time records" of their activity as Committeemen.

4. After two and one-half years of intense litigation, these consolidated Civil Actions were the subject of negotiated settlements totaling in excess of $23,500,000.00.

5. The Lazzara represented cases settled as follows: Rapp widow/children for death of husband/father, $954,000.00; Gros 80 year old mother for loss of son, $80,000.00; Rapp estate for death of brother, $16,000.00. Her *Ledet* case for death of a fiance was prosecuted by her in state court and was lost on a pre-trial motion on legal grounds. *Ledet v. Continental*, 380 So.2d 655 (4 Cir. 1980). Therefore, by the time of settlement, this case in federal court had no settlement value and was voluntarily dismissed on behalf of plaintiff, Ledet. The Berger represented Thompson case settled for $95,000.00 for the death of a son.

6. Leonard Washofsky testified as follows: He was the attorney for various plaintiffs in the Continental Grain case and was elected a member of the Plaintiffs' Legal Committee. His clients were Continental Grain employees or their survivors. Pursuant to this Court's order of August 18, 1978, he kept contemporary time records of his Committee activities, the summary of which accounts for 1301 hours expended on these cases. Exhibit R24. He adjusted these hours for the purpose of this hearing to include 300 hours for the reading of mail, pleadings and literature related to these cases. In addition, there were upward adjustments for travel time of some 400 hours to include departure to return time as opposed to working time. Exhibit P-12; Compare Exhibits R24 to P12 on 7/10-12/78, 9/17-18/78, 11/3-10/78, 11/13-16/78, 12/3-6/78, 3/25-28/79, 4/2-3/79, 5/19-24/79, 9/16-20/79, 11/14-15/79. His adjusted time records totaled 2024 hours. From his personal clients in these cases, he received contingent fees of $622,000.00. To date, he received $122,000.00 as his share of the Plaintiffs' Legal Committee fees.

7. James Wysocki testified as follows. He was the attorney for a plaintiff in the Continental Grain case and was elected as a supplemental member of the Plaintiffs' Legal Committee. His clients were the survivors of a Federal Grain Inspection Service employee. He did not keep contemporary time records of his Committee activities. In June, 1980, in anticipation of the attorneys' fee hearing in these cases, he reconstructed time records by referring to his calendars and the Court's minute entries and docket

sheets. He adjusted these reconstructed hours to include 296 hours for the reading of mail, pleadings and literature related to these cases. Exhibit P-14; 11-A. His adjusted time records totaled 1,434 hours. From his personal clients in these cases, he received a contingent fee of $276,000.00. To date, he has received $90,000.00 as his share of the Plaintiffs' Legal Committee fees.

8. Stephen Murray testified as follows. He was the attorney for various plaintiffs in the Continental Grain cases and was elected a member of the Plaintiffs' Legal Committee. His clients were independent contractor employees or their survivors. Pursuant to this Court's order of August 18, 1978, he kept contemporary time records of his Committee activities, a summary of which accounts for 3420 hours expended on these cases. Exhibit P-7. From his personal clients in these cases, he received contingent fees of $310,000.00. To date, he has received $190,000.00 as his share of the Plaintiffs' Legal Committee fees.

9. A. Remy Fransen testified as follows. He was the attorney for various plaintiffs in the Continental Grain cases and was elected a member of the Plaintiffs' Legal Committee. Pursuant to this Court's order of August 18, 1978, he kept contemporary time records of his Committee activities, a summary of which accounts for 1610 hours expended on these cases. Exhibit P-15. From his personal clients in these cases, he received contingent fees of $247,000.00. To date, he has received $158,000.00 as his

share of the Plaintiffs' Legal Committee fees.

10. Russ Herman testified as follows. He was the attorney for various plaintiffs in the Continental Grain cases and was elected a member of the Plaintiffs' Legal Committee. Pursuant to this Court's order of August 18, 1978, he kept contemporary time records of his Committee activities, a summary of which accounts for 3707 hours expended on these cases. Exhibit P-6. From his personal clients in these cases, he received contingent fees of $189,000.00. To date, he has received $200,000.00 as his share of the Plaintiffs' Legal Committee fees.

11. John J. Cummings, III testified as follows. He was the attorney for various plaintiffs in the Continental Grain cases and was elected a member of the Plaintiffs' Legal Committee. Pursuant to this Court's order of August 18, 1978, he kept contemporary time records of his Committee activities, a summary of which accounts for 6798 hours expended on these cases. Exhibit P-5. From his personal clients in these cases, he received contingent fees of $434,000.00. To date, he has received $350,000.00 as his share of the Plaintiffs' Legal Committee fees.

12. Wendell H. Gauthier testified as follows. He was the attorney for various plaintiffs in the Continental Grain cases and was elected a member of the Plaintiffs' Legal Committee. Pursuant to this Court's order of August 18, 1978, he kept contemporary time records of his Committee activities, a summary of which accounts for 4317 hours ex-

pended on these cases. Exhibit P-9. From his personal clients in these cases, he received contingent fees of $420,000.00. To date, he has received $235,000.00 as his share of the Plaintiffs' Legal Committee fees.

13. In summer, 1979, at the request of most plaintiffs and all defendants, Circuit Judge Alvin B. Rubin undertook the mediation of the settlement of these cases. The lone dissenting voice to Judge Rubin being mediator was respondent Lazzara through her attorney Gibson Tucker. Before he withdrew from his roll as mediator, Judge Rubin fixed certain amounts which would be paid in settlement of various elements of each claim. For example: loss of love and affection by surviving spouse, $85,000.00; loss of love and affection by surviving child age 0-12, $50,000.00; loss of love and affection by surviving child age 13-17, $35,000.00; loss of love and affection by surviving child age over 18, $25,000.00; loss of love and affection by surviving parent, $40,000.00; loss of love and affection by surviving siblings, $15,000.00; conscious pain and suffering in death case, $7,500.00. He also set a one time potential for promotion add on of 10 percent and personal consumption deductions of 20 or 30 percent depending on the average age of the surviving children. Judge Rubin arranged for the services of an economist, William Landes, who eventually fixed a net discount figure of 1.2 percent taking into consideration potential investment income and inflation. Judge Rubin's figures were utilized in the final formula wherein each case was settled. For the most part, each plaintiff and each class of plaintiffs were treated

equally in the final settlement formula. For example, each non Continental employee was given the advantage of the benefits contained from the Continental Grain Union contract. Each was given a 12 percent raise over the 1977 base for 1978, a 13 percent raise for 1979 and an additional 10 percent for loss of fringe benefits. In other words, respondent Lazzara's clients, the survivors of non Continental employees, directly benefited by having their claims settled within the same formula context as the claims of Continental employees' survivors. Respondent Berger represented the parents of a deceased Continental employee.

14. This Court finds that the $954,000.00 Rapp settlement and the $80,000.00 Gros settlement negotiated by the Plaintiffs' Legal Committee on behalf of respondent Lazzara's clients and the $95,000.00 Thompson settlement negotiated on behalf of respondent Berger's client exceed the judgment value of these claims as reflected in reported decisions in state and federal cases within this District and in the State of Louisiana. *Canter v. Koehring*, 283 so.2d 716 (1973); *Barr v. Louisiana*, 355 So.2d 52 (2 Cir. 1978); *Aymond v. Louisiana*, 333 So.2d 383 (3 Cir. 1976); *Blanchard v. Rodrigue*, 340 So.2d 1001 (1 Cir. 1976); *Billiot v. Bourg*, 338 So.2d 1148 (1976); *Matthews v. Standard Life*, 213 So.2d 128 (3 Cir. 1968); Moore v. Travelers, 352 So.2d 270 (2 Cir. 1977); *Bryant v. Travelers*, 307 So.2d 749 (1 Cir. 1975). These settlements represent outstanding, ultimate dollar values.

15. This Court finds that there were legal impediments to a direct recovery in the Rapp and Gros cases against Continental Grain Company. Louisiana Revised Statutes, 23:1061, provides that a non employee may be limited to compensation recovery if the non employee was engaged in performing a job within the trade, business, or occupation of the tort defendant. Since Continental Grain Company had a maintenance crew which on occasion performed painting work, it is arguable that Rapp and Gros, employees of an independent painter contractor, were statutory employees of Continental Grain and their recovery against Continental was limited to workmen compensation benefits. See: *Sisk v. I.N.A.*, 356 So.2d 1109 (2 Cir. 1978). Given the contested facts on this issue, it is doubtful whether a successful summary judgment motion could have been urged by any party.

16. Respondent Lazzara claims that her clients' "lock, absolute liability, res ipsa" cases against Continental grain entitled them to a bonus settlement above the Continental employees' settlement. This position is frivolous. Respondent Lazzara and her clients were not forced to compromise their claims. At the end of this litigation, defendants were prepared to collectively admit liability and try any plaintiff's quantum claim. In fact, respondent Lazzara could not risk trial of the $954,000.00 Rapp case because the $954,000.00 was derived from a formula tied to the Continental Grain union contract plus fringe benefits whereas Rapp's employer was non union and provided no fringe benefits. Furthermore, Rapp's $30,000.00

income in 1977, as calculated by Mrs. Lazzara, was out of line with his reported $12,000.00 per year income in prior years. In other words, the $954,000.00 Rapp settlement was greatly in excess of the judgment value of the Rapp case standing alone.

17. It is appropriate for this Court to comment on the overall accomplishments of the Plaintiffs' Legal Committee. For two and one-half years the Committee developed extensive evidence against numerous defendants. Defendants who contributed varying sums to the final settlement are: Continental Grain Company and certain of its individual executive officers; R. S. Fling, Inc., the elevator's design engineer; CEA-Carter Day, the manufacturer of the grain dust collection system; LeGardeur International, Inc., MacDonald Engineering Inc. and Weitz Company, general contractors who built various structural components of the elevator; Orleans Electric Contractors, Fegles Power Service, Inc., H. A. Williams & Associates, subcontractors and their engineers who worked on parts of the elevator; Degesch Gm bH, Phostoxin Sales, Inc., and Industrial Fumigant, chemical anti pest fumigant manufacturers and suppliers. Millions of documents were reviewed, videotaped and catalogued for use at trial. The Committee participated in over 125 days of depositions, hundreds of discovery motions and filed and amended suits on behalf of 51 separate plaintiff interests in Louisiana as well as in six other federal jurisdictions. This Court personally observed the activity of the Committee members during numerous conferences as well as during weekly mo-

tion hearings on the various discovery issues. The Committee was always prepared and the Court was particularly impressed with the Committee's leadership and professional demeanor.* The result produced by the Committee clearly speaks in favor of its skill and dedication to the successful resolution of this complex litigation. The Committee was relentless, and proved that the District Court made a proper decision to entrust the representation of all plaintiffs to these men.

18. During the course of this litigation, respondents, Lazzara and Berger, did not sit idly by while the Plaintiffs' Committee prepared the cases for trial. Both frequently advised and counseled their clients and performed gratis legal work for them. Both prepared first class settlement brochures for presentation to the defendants' settlement Committee. At the beginning of the deposition schedule, both on occasion attended discovery depositions being taken by the Plaintiffs' Legal Committee. See: Exhibit Respondent 41, 42 and Berger 1.

19. By contract, the recovery on each Committee member's personal cases was not subject to the eight percent fee assessed against the recovery on non Committee member's cases. Given this fact, this Court feels that it would be inappropriate to merely assess the eight percent

*The failure of one member of the Committee to maintain contemporaneous time records does not detract from the skillful accomplishments of the Committee as a whole throughout this novel and difficult litigation.

fee against respondents' cases merely because that is what was done contractually in the other cases.

20. This Court finds that the fairest method of calculating a fee would be as follows. The Court will compare respondents' clients' recovery to the total recovery of all plaintiffs and will calculate the percentage of their recovery to the whole recovery. This percentage will then be multiplied times the Plaintiffs' Committee's acceptable hours. This product will be multiplied by an appropriate hourly rate and the result will be the attorneys' fee to be paid by respondents to the Plaintiffs' Committee.

21. Applying the principles of *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5 Cir. 1974), and the facts found aforesaid, this Court finds that a fair and equitable hourly attorneys' fee is $100.00 per hour. See: *Neely v. City of Grenada*, (5 Cir. No. 78-1762, August 20, 1980).

22. Because of the method by which many of the members of the Plaintiffs' Committee kept their hours and because of the Wysocki reconstruction, this Court cannot with certainty determine the total hours that they expended in this litigation. The Committee claims 23,310 hours. This Court finds that between September 11, 1978, the date the Committee was appointed, to May 5, 1980, the date the order of dismissal was entered, the Plaintiffs' Committee expended 21,000 hours in the prosecution of this litigation.

23. Lazzara Fee Calculation. $1,034,000 received by her clients* divided by $23,500,000 received by all plaintiffs equals .044 times 21,000 Committee hours equals 924 times $100 per hour equals a $92,400 attorney's fee to be paid by respondent Lazzara to Plaintiffs' Committee.

24. Berger Fee Calculation. $95,000 received by his clients divided by $23,500,000 received by all plaintiffs equals .004 times 21,000 Committee hours equals 84 times $100 per hour equals a $8,400 attorney's fee to be paid by respondent Berger to Plaintiffs' Committee.

RECOMMENDATION

If the District Judge finds respondents are legally obligated to pay an attorneys' fee to the Plaintiffs' Legal Committee, it is recommended that the attorneys' fee be fixed at $92,400 to be paid by Ann Clark Lazzara and $8,400 to be paid by Allan Berger.

New Orleans, Louisiana, September 5, 1980.

/S/JAMES D. CARRIERE
JAMES D. CARRIERE
United States Magistrate

*The $16,000 received in settlement by the Rapp estate for the death of brother is not included in this sum because this case settled solely because of the effort of Ms. Lazzara with the intervention of this Court.

APPENDIX "E"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ALBERT NELSON	CIVIL ACTION
versus	NUMBER 78-19 and Consolidated Cases
CONTINENTAL GRAIN COMPANY	SECTION "F" (2)

RULE TO SHOW CAUSE

All parties are to show cause on July 31, 1978, at 2:00 P.M. before United States Magistrate James D. Carriere, why, in these consolidated Civil Actions, the Court should or should not appoint the presently-constituted "Plaintiff's Committee" as counsel to handle all the pretrial activity of these cases with compensation for these services to be paid in accord with the agreement previously executed by the majority of plaintiffs and their attorneys. Memoranda to be filed by July 24, 1978.

New Orleans, Louisiana, June 22, 1978.

/S/JAMES CARRIERE
JAMES D. CARRIERE
United States Magistrate

APPENDIX "F"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ALBERT NELSON	CIVIL ACTION
versus	NUMBER 78-19 and Consolidated Cases
CONTINENTAL GRAIN COMPANY, ET AL	SECTION "F" (2)

ORDER

IT IS ORDERED that a Plaintiffs' Trial Committee shall prosecute the liability issues of these consolidated cases on behalf of all personal injury plaintiffs.

This committee shall consist of the following members:

Mr. John J. Cummings, III
Attorney At Law
416 Gravier Street
New Orleans, LA 70130

Mr. A. Remy Fransen, Jr.
841 Carondelet Street
New Orleans, LA 70130

Mr. Wendell H. Gauthier
3213 Florida Avenue, Suite 100
Kenner, LA 70062

Mr. Russ M. Herman
1010 Common Street, Suite 505
New Orleans, Louisiana 70112

Mr. Stephen B. Murray
612 Gravier Street
New Orleans, LA 70130

Mr. Leonard A. Washofsky
1411 Decatur Street
New Orleans, LA 70116

Mr. James A. Wysocki
1410 First National Bank of Commmerce Building
New Orleans, LA 70112

The committee's duties and responsibilities shall be:

A. To conduct liability discovery on behalf of all personal injury plaintiffs who have filed civil actions in this Court.

B. Initiate, brief and argue motions and, when necessary, oppose motions and proceedings initiated by any or all of the defendants on liability matters.

C. Enter into stipulations with liaison counsel for any and all defendants regarding the liability phase of these cases.

D. Act as spokesmen at court conferences, subject to the right of any attorney for each plaintiff to appear at the conferences and present individual or divergent positions.

E. Prepare periodic status and progress reports and mail them to the attorney for each plaintiff.

F. Maintain files of all pre-trial liability matters and have them available for examination by the attorney for any plaintiff.

G. Collect from plaintiffs, through their counsel, including claimant's represented by committee members, the sum of FIVE HUNDRED AND NO/100 ($500.00) DOLLARS per claim. With regard to the death cases, a claim is intended to refer to each decedent. These amounts are to be used to defray costs expended by the committee in connection with the carrying out of duties and responsibilities imposed on it. These funds are to be deposited in a checking account and a periodic report of costs and disbursments shall be given to counsel for each plaintiff. This sum may be supplemented by court order as the need arises.

H. To cause to be issued all subpoenas for all witnesses and documents for the pre-trial and trial of the liability phase of these cases and to conduct the trial of the liability phase of these cases.

I. To marshal information and supporting documents pertaining to the damage aspect of each claim.

J. To assist each individual plaintiff's attorney in the preparation of the damage aspect of these cases as re-

quested by the individual plaintiff's attorney.

K. To discuss settlement figures with the defendants for recommendation to the attorney for each plaintiff.

L. To do all those acts required to accomplish the above including the hiring of experts and support personnel.

M. No member of the Committee may withdraw from the Committee or his duties herein without court approval.

N. To elect and substitute a committee member with court approval when a vacancy occurs due to the illness or inability to act.

O. To represent fairly not only the interests of the Committee and the plaintiffs as a whole but each individual plaintiff and each particular class of plaintiffs.

P. The Committee is so constituted that each class of plaintiffs (employees of Continental; contractors; Federal employees; business invitees; claimants pursuant to Maritime Law or Federal Statute; claimants for State or Federal compensation and/or Social Security Benefits; claimants for Longshoreman and Harbor Workers compensation; claimants for wages; claimants for injuries and/or wrongful death and/or survival actions; claimants pursuant to Federal Tort Claims Act) is represented by a member of the Committee and in order to avoid conflicts of

interest it shall be the duty of the Committee to see to it that at all times during the course of litigation that each class of plaintiff has a representative on the Committee to represent that class of claimants' best interest, including presence during discovery.

Q. To file administrative claims pursuant to the Federal Tort Claims Act on behalf of each plaintiff.

IT IF FURTHER ORDERED that the above named Trial Committee will supervise and coordinate the prosecution of the cases of plaintiffs, who have not contracted with the Plaintiffs' Legal Committee, for the purposes of discovery, preparation for trial, and trial of all liability issues. These plaintiffs are ordered to pay a pro rata share of expenses of the litigation pursuant to paragraph G of this order. The compensation to be awarded to the members of the Committee on the cases of the plaintiffs who have not contracted with the Plaintiffs' Legal Committee will be set by the court at the conclusion of the litigation. The fee will be based upon all relevant circumstances and will be contingent upon recovery in tort, with no fee due the Committee for any sums recovered in Compensation or Social Security Benefits.

New Orleans, Louisiana, this 11th day of September, 1978.

/S/LANSING L. MITCHELL
UNITED STATES DISTRICT JUDGE

APPENDIX "G"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ALBERT NELSON	CIVIL ACTION NO. 78-19
VERSUS	SECTION "F" (2)
CONTINENTAL GRAIN CO., ET AL	CONSOLIDATED CASES

****

MOTION TO ADOPT SPECIAL MASTER'S FINDING AND RECOMMENDATION

NOW INTO COURT, through undersigned counsel comes the Plaintiffs' Legal Committee and moves the Court pursuant to Federal Rules of Civil Procedure 53 (e)(2) for an order compelling respondents, Ann Clark Lazzara and Allan Berger to pay an attorney's fee to the Plaintiffs' Legal Committee, and adopting the Findings of Fact and Recommendations of the Special Master filed herein September 5, 1980 for the reasons more fully set forth in the accompanying memorandum.

Respectfully submitted:

/S/STEPHEN B. MURRAY

PLAINTIFFS' LEGAL COMMITTEE/
CONTINENTAL GRAIN DISASTER
John J. Cummings, III
A. Remy Fransen, Jr.
Russ M. Herman
Wendell H. Gauthier
Stephen B. Murray
Leonard A. Washofsky
James A. Wysocki

APPENDIX "H"

MINUTE ENTRY
AUGUST 18, 1978
CARRIERE, M.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ALBERT NELSON — CIVIL ACTION

versus — NUMBER 78-19 and Consolidated Cases
CONTINENTAL GRAIN COMPANY, ET AL — SECTION "F" (2)

Commencing this date, each member of the plaintiffs' committee will maintain comprehensive time records concerning all activity devoted to the prosecution of plaintiffs' causes of action.

/S/JAMES CARRIERE
JAMES D. CARRIERE
United States Magistrate

APPENDIX "I"

§ 218. Contract for fee based on proportion of subject matter; stipulation concerning compromise, discontinuance or settlement

By written contract signed by his client, an attorney at law may acquire as his fee an interest in the subject matter of a suit, proposed suit, or claim in the assertion, prosecution or defense of which he is employed, whether the claim or suit be for money or for property. In such contract, it may be stipulated that neither the attorney nor the client may, without the written consent of the other, settle, compromise, release, discontinue or otherwise dispose of the suit or claim. Either party to the contract may, at any time, file and record it with the clerk of court in the parish in which the suit is pending or is to be brought orwith the clerk of court in the parish of the client's domicile. After such filing, any settlement, compromise, discontinuance, or other disposition made of the suit or claim by either the attorney or the client, without the written consent of the other, is null and void and the suit or claim shall be proceeded with as if no such settlement, compromise, discontinuance, or other disposition had been made.

Amended by Acts 1975,No. 670, §1.

1.47 Sample Order Directing Counsel to M ain Contemporary Records of Time Spent in Potential Class Action.

The above styled action has been filed as a potential class action in which the plaintiff seeks to act as the representative of a class of persons "so numerous that joinder of all members is impracticable," within the meaning of Rule 23(a)(1), F.R.Civ.P. In order for counsel representing the plaintiff class to be awarded attorney's fees as the class counsel, it is necessary that they maintain "contemporary time records, kept on a day-to-day basis" of the time spent by them in this action, *Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp.*, 382 F.Supp. 999, 1011 (E.D.Pa. 1974), affirmed in pertinent part, 540 F.2d 102, 109 (3d Cir. 1976), with specific descriptions of the activities of each attorney for all of the time recorded. *Lindy Bros. Builders, Inc., of Philadelphia v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 167 (3d Cir. 1973). Reconstructions of expenditures of time are not a sufficient basis for an award of attorney's fees. *Id.*

It is therefore

ORDERED that the attorney seeking to represent the potential class in this action maintain contemporary, day-to-day records revealing specifically what activities were performed by each attorney and the time spent by h..m in each activity and that such records continue to be maintained after any class certification and until the con-

clusion of the action by class counsel. It is further

ORDERED that the records being maintained by the attorneys in accordance with this order be produced at each pre-trial conference held in this action for inspection by the court.

Dated this_____day of_____, 19 __ .

_____
JUDGE